

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

ROY SPA, LLC,)	
)	
Respondent,)	
and)	Case No.: 19-CA-83329
)	
INTERNATIONAL BROTHERHOOD OF)	
TEAMSTERS LOCAL 2,)	
)	
Charging Party.)	

**ROY SPA LLC’S REPLY TO
GENERAL COUNSEL’S OPPOSITION TO RESPONDENT’S MOTION FOR
RECONSIDERATION OF THE BOARD DECISION**

Extraordinary circumstances for granting Roy Spa’s Motion for Reconsideration are evident, *to wit*, neither the Board’s July 27, 2017, Roy Spa, LLC, 365 N.L.R.B. No. 114 (“Roy Spa II”), nor its May 10, 2016, 363 N.L.R.B. No. 183 (2016) (“Roy Spa I”), decision denying fees and expenses under the EAJA follow the EAJA’s explicit statutory terms.

1. The Motion at 9 explains both Board’s Decisions explicitly fail to state whether the General Counsel’s “underlying position” in the case (on national defense jurisdiction or commerce jurisdiction) and his “litigation position” in the case (on national defense jurisdiction or commerce jurisdiction) were substantially justified under 5 U.S.C. §504(b)(E). While ALJ Marchionese explained the existence of a dichotomy in how the Board reached its decisions in the older cases on national defense jurisdiction differently from the more recent decisions, the General Counsel produced no explanation how the claim he asserted was based either on the older cases or on the recent cases.

In this EAJA review, the Motion for Reconsideration points out the General

Counsel, and now the Board, has never explained how it could be reasonable to plead commerce jurisdiction and national defense jurisdiction in the Complaint when no evidence was introduced to prove either jurisdictional claim, and 2) why the GC produced no evidence to prove either jurisdictional allegation.

EAJA requires examining the “litigation position” of the General Counsel on national defense jurisdiction. The Board’s two Decisions do not employ this statutory language to claim the General Counsel’s litigation position was “substantially justified.” The General Counsel’s opposition paper does not contest this deficiency. His opposition does not even suggest any place where supporting evidence of his position was introduced or discussed in the Board’s Decisions.

Therefore, Roy Spa I and Roy Spa II failed to establish whether the General Counsel was substantially justified to litigate national defense jurisdiction without introducing any evidence of the impact hair cutting/styling has on national defense? Roy Spa found no production of such evidence or explanation in the record which are the reasons it moved for Reconsideration. Without evidence supporting the GC’s “litigation position”—as distinguished from an argument supporting his “underlying” investigation of the claim—the Board’s failure to make that “litigation position” ruling is not a decision supportable on the record. See John S. Barnes Corp., 197 N.L.R.B. 32 (1972) (granting motion for reconsideration to further explain its decision). If the Decision is not supportable, it is not reasonable. Allentown Mack Sales & Serv. v. NLRB, 522 U.S. 359, 378 (1998).

2. Reconsideration of the sixty-nine day extension is based on the explicit language of the Board’s Regulation. 29 C.F.R. §102.49(b). Chairman’s Miscimarra’s

analysis demonstrates the majority's interpretation created consequences in ALJ Giannasi's rendering his document review. Because he presumed successorship could have been found if every other issue was resolved against Roy Spa, including credibility, the GC's Complaint was reasonable.

The General Counsel contends strict adherence to the EAJA regulations to prevent unintended or cascading consequences are not extraordinary enough to merit reconsideration. He also argues Roy Spa seeks reconsideration on a ground Roy Spa did not argue—Board “constituency.” What he ascribes as “new’ elements” raised by Roy Spa are the very “complications” identified in the Chairman’s dissent.

These “complications” highlight specific EAJA rules must apply to individual EAJA cases, especially when an EAJA prevailing party wins at an early stage of a case or on jurisdiction, as here. Reliance upon prognostication of the case the GC lost, departs from statutory language and congressional intent, scrutinizes the wrong part of the case, and disincentivizes EAJA claimants’ defense.

The Board established specific EAJA regulations for a reason. Breach of those terms in an EAJA proceeding requires a decisionmaking process that follows the purpose under which the Board created them. Granting relief to the General Counsel led to consequences (a “merits” opinion) that should not have occurred.

The Board should grant this Motion to reconsider its rulings to prevent present and future complications for its EAJA statutory review.

WHEREFORE, the Board should grant Roy Spa’s Motion for Reconsideration of its earlier Decisions and grant the Application for fees and expenses.

Respectfully submitted,

/s Michael E. Avakian

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September 12, 2017

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the APPLICANT'S MOTION FOR RECONSIDERATION was efiled to the Executive Secretary's Office and emailed to the following persons on this the 12th day of September 2017:

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